

Message Text

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C O N F I D E N T I A L SECTION 1 OF 3 GENEV 5882

E.O. 11652: GDS

TAGS: ECOSOC

SUBJECT: 63RD ECOSOC: PLO MEMBERSHIP IN ECWA

TRANSMITTED BELOW IS THE TEXT OF THE LEGAL OPINION ON MEMBERSHIP IN ECWA. AS INDICATED IN PREVIOUS CABLES, SECRETARIAT PLANS TO DENY THE EXISTENCE OF THIS DOCUMENT; HOWEVER, IT IS WIDELY CIRCULATING AMONG DELEGATIONS AT THIS ECOSOC.

MEMBERSHIP OF ECWA

1. THIS IS IN RESPONSE TO THE MEMORANDUM MR. VAN HOEK ADDRESSED TO ME, ON YOUR BEHALF, ON 25 MAY, CONCERNING THE PROPOSED ADMISSINN OF THE PALESTINE LIBERATION ORGANIZATION AND OF EGYPT TO THE ECONOMIC COMMISSION FOR WESTERN ASIA. MEMORANDA ON THIS SUBJECT WERE ALSO ADDRESSED TO MR. SLOAN BY MR. MILLS ON 26 MAY AND BY MR. CORDOVEZ TO MY SELF ON 6 JUNE, AND THE PRESENT MEMORANDUM IS INTENDED TO RESPOND ALSO TO THESE.

I. MEMBERSHIP OF PLO

2. ON 26 APRIL 1977 ECWA ADOPTED RESOLUTION 36(IV) ON THE
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"APPLICATION BY THE PALESTINIAN LIBERATION ORGANIZATION FOR FULL MEMBERSHIP OF THE ECONOMIC COMMISSION FOR WESTERN ASIA" IN WHICH (CONSISTENTLY WITH OUR VIEWS EXPRESSED IN MR. SLOAN'S MEMORANDA TO MR. PAW U ON 6 JANUARY AND 16 FEBRUARY 1977 THAT THIS APPLICATION COULD NOT BE CONSIDERED UNDER THE EXISTING TERMS OF REFERENCE OF

THE COMMISSION) IT CALLED UPON ECOSOC TO AMEND ARTICLE 2 OF ITS RESOLUTION 1818 (LV) (THE TERMS OF REFERENCE OF ECWA) SO AS TO MAKE THE PLO A MEMBER OF ECWA. AT PRESENT, THAT PARAGRAPH ONLY PROVIDES FOR MEMBERSHIP IN THE COMMISSION BY MEMBERS STATES OF THE UN "SITUATED IN WESTERN ASIA, WHICH USED TO CALL ON THE SERVICES OF THE ECONOMIC AND SOCIAL OFFICE IN BEIRUT" OR THOSE WHOSE APPLICATIONS ARE DECIDED ON BY ECOSOC UPON THE RECOMMENDATION OF ECWA.

3. IT SHOULD BE NOTED THAT THE REGIONAL COMMISSIONS OF THE UNITED NATIONS HAVE BEEN ESTABLISHED BY ECOSOC PURSUANT TO ARTICLE 68 OF THE CHARTER, WHICH PROVIDES THAT: "THE ECONOMIC AND SOCIAL COUNCIL SHALL SET UP COMMISSIONS IN ECONOMIC AND SOCIAL FIELDS . . .". THAT ARTICLE DOES NOT EXPLICITLY SPECIFY THAT THE MEMBERSHIP OF COMMISSIONS ESTABLISHED PURSUANT TO IT SHOULD BE RESTRICTED TO MEMBERS OF THE UN, OR TO STATES, OR EVEN TO ENTITIES HAVING INTERNATIONAL PERSONALITY. AS A MATTER OF FACT, RESEARCH IN THE HISTORY OF THE CHARTER SHOWS THAT IN THE ORIGINAL DRAFT PREPARED AT DUMBARTON OAKS IT HAD BEEN FORESEEN THAT COMMISSIONS ESTABLISHED BY ECOSOC WOULD CONSIST OF INDIVIDUAL EXPERTS (DOCUMENTS OF U.N.C.I.O., VOL. 3, DEC. 1 G/1, P. 21). ALTHOUGH THIS

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REQUIREMENT WAS DELETED AT THE SAN FRANCISCO CONFERENCE, THIS WAS ONLY DONE SO AS NOT TO LIMIT THE COUNCIL DISCRETION IN DETERMINING THE COMPOSITION OF ITS COMMISSIONS (IBID., VOL. 8, DOC. 924, II/12, P. 88). THE PREPARATORY COMMISSION FOR THE UN CONSEQUENTLY RECOMMENDED THAT THESE COMMISSIONS "SHOULD CONTAIN A MAJORITY OF RESPONSIBLE, HIGHLY-QUALIFIED GOVERNMENTAL REPRESENTATIVES" (PC/20, CHAP. III, SEC. 4, PARA. 37). WHEN THESE RECOMMENDATIONS WERE CONSIDERED AT THE FIRST SESSION OF THE GENERAL ASSEMBLY, A JOINT SUB-COMMITTEE OF THE SECOND AND THIRD COMMITTEES INDICATED THAT SOME MEMBERS DOUBTED WHETHER THE RECOMMENDATION THAT MOST COMMISSIONS SHOULD CONTAIN A MAJORITY OF GOVERNMENTAL REPRESENTATIVES WAS DESIRABLE AND ALLOWED THE COUNCIL SUFFICIENT FREEDOM; THIS RECOMMENDATION OF THE PREPARATORY COMMISSION WAS THEREFORE APPROVED ON THE UNDERSTANDING THAT NO LIMITATION SHOULD BE PUT ON THE COUNCIL IN CHOOSING THE MEMBERS OF COMMISSIONS (A/16 AND 17). EXCEPT FOR THIS LIMINAL CONSIDERATION BY THE GENERAL ASSEMBLY, THAT ORGAN HAS NOT OTHERWISE INTERVENED IN THE COUNCIL'S AUTHORITY TO ESTABLISH OR TO DETERMINE THE

COMPOSITIONS OF REGIONAL COMMISSIONS.

4. IN THE PAST, THE COMPOSITIONS OF THE FOUR EARLIER REGIONAL COMMISSIONS WERE EXTENSIVELY CONSIDERED BY ECOSOC ON SEVERAL OCCASIONS, GENERALLY IN THE CONTEXT OF PROPOSALS TO MAKE NON-MEMBER STATES OF THE UN OR NON-SELF-GOVERNING TERRITORIES FULL MEMBERS OF CERTAIN COMMISSIONS. IN CONNEXION WITH THESE CONSIDERATIONS, SEVERAL LEGAL OPINIONS WERE EXPRESSED BY THE SECRETARIAT:

(A) AT A MEETING OF THE COMMITTEE OF THE WHOLE OF ECAFE HELD IN NEW YORK ON 10 JULY 1947, THE ASSISTANT SECRETARY-GENERAL IN CHARGE OF THE LEGAL DEPARTMENT CONCLUDED THAT WHILE CONFIDENTIAL

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THERE WAS NO EXPLICIT PROVISION IN THE CHARTER ON THE QUESTION OF WHETHER NON-MEMBER STATES OF THE UN COULD BECOME FULL MEMBERS OF ECAFE, THE CHARTER ENVISAGED A CLEAR DIFFERENCE BETWEEN MEMBERS AND NON-MEMBERS AND "THAT THIS DIFFERENCE RESTED UPON THE FUNDAMENTAL PRINCIPLE THAT RIGHTS OF MEMBERSHIP SHOULD NOT BE GRANTED UNLESS THE OBLIGATIONS OF MEMBERSHIP WERE ALSO ASSUMED". ON THE OTHER HAND, THE GRANT OF FULL COMMISSION MEMBERSHIP TO NON-SELF-GOVERNING TERRITORIES "WOULD BE CONTRARY TO THE SPECIAL REGIME PRESCRIBED FOR SUCH TERRITORIES IN CHAPTERS XI, XII AND XIII OF THE CHARTER". (E/491, REPRODUCED IN E.S.C. OFF. REC. 5#TH SESS., SUPPL. NO. 6, PART II, P. 19.)

(B) DURING THE 13TH SESSION OF ECOSOC (SEPTEMBER 1951), AN OPINION OF THE LEGAL DEPARTMENT OF THE UNITED NATIONS WAS READ TO THE COUNCIL WHICH EMPHASIZED THAT NEITHER ARTICLE 68 NOR ANY OTHER ARTICLE OF THE CHARTER IMPOSED ANY CONDITION ON THE COMPOSITION OF REGIONAL COMMISSIONS. RECALLING THE HISTORY OF THAT PROVISION (AS CITED IN PARA. 3 ABOVE), THE OPINION CONCLUDED THAT THE COUNCIL "HAVING WIDE DISCRETION IN DETERMINING THE COMPOSITION OF ITS COMMISSIONS. RECALLING THE HISTORY OF THAT THE COUNCIL "HAVING WIDE DISCRETION IN DETERMINING THE COMPOSITION OF ITS COMMISSIONS, MAY ACCORD TO NON-MEMBER STATES THE RIGHT TO VOTE IN ECE" (E/SR.555, PARA. 83).

(C) IN RESPONSE TO A REQUEST MADE AT THE 15TH SESSION OF ECOSOC FOR A LEGAL STUDY ON WHETHER FULL MEMBERSHIP WITH VOTING RIGHTS IN COMMISSIONS COULD BE GRANTED TO NON-MEMBERS STATES, THE SECRETARY-GENERAL PREPARED A MEMORANDUM (E/2458, REPRODUCED IN E.S.C. OFF. REC. 17TH SESS. ANNEXES, A.I. 8, PP.1-3) IN WHICH HE EXAMINED IN DETAIL THE HISTORY OF ARTICLE 68 OF THE CHARTER THE PRACTICE OF ECOSOC, THE POSSIBLE IMPLICATIONS OF ARTICLE 69 (RELATING TO THE PROCEDURES OF ECOSOC ITSELF) AND OF ARTICLE 4 (RELATING TO MEMBERSHIP IN THE ORGANIZATION) AND CONCLUDED THAT CONFIDENTIAL

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THE COUNCIL "HAS AUTHORITY BY VIRTURE OF ARTICLE 68 OF THE
CHARTER TO GRANT FULL MEMBERSHIP IN THE REGIONAL COMMISSIONS
TO STATES WHICH ARE NOT MEMBERS OF THE UNITED NATIONS."

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5. ALTHOUGH THESE PREVIOUS OPINIONS ONLY ADDRESSED THE POSSIBILITY
OF MEMBERSHIP IN REGIONAL COMMISSIONS BY NON-MEMBER STATES OR BY
NON-SELF-GOVERNING TERRITORIES, THE HISTORY AND REASONING ON
WHICH THEY WERE BASED COULD SUPPORT THE PROPOSITION THAT IN VIEW
OF THE SILENCE OF THE CHARTER AND OF THE GENERAL ASSEMBLY ON THIS
SUBJECT, ECOSOC HAS AUTHORITY TO GRANT MEMBERSHIP IN THESE COMM-
ISSIONS TO ENTITIES THAT ARE NOT EVEN STATES OR TERRITORIES.
HOWEVER, ALTHOUGH ECOSOC DID ESTABLISH FUNCTIONAL COMMISSIONS
COMPOSED OF INDIVIDUALS, AS TO THE REGIONAL COMMISSIONS IT HAS
BEEN THE INVARIABLE PRACTICE OF THE COUNCIL TO GRANT FULL MEMBERSHIP
ONLY TO STATES -- IN GENERAL MEMBERS OF THE ORGANIZATION, THROUGH
THERE HAVE BEEN SOME EXCEPTIONS (E.G., THE MEMBERSHIP OF SWITZER-
LAND IN ECE). THIS PRACTICE RESTS ON THE PRINCIPLE THAT THE
MEMBERSHIP OF CERTAIN ORGANS, AS OF THE ORGANIZATION ITSELF, MUST
BE RESTRICTED TO STATES; THE UNPRECEDENTED
CREATION OF MEXED ORGANS, CONSISTING OF BOTH STATES AND OTHER
ENTITIES, WOULD IMPLY A DEPARTURE FROM THIS WELL-ESTABLISHED
PRACTICE. BEFORE DOING SO, THE COUNCIL MIGHT WISH TO COSULT
THE GENERAL ASSEMBLY, WHICH IS THE ORGAN THAT UNDER ARTICLE 60
OF THE CHARTER IS VESTED WITH PRIMARY RESPONSIBILITY FOR THE
DISCHARGE OF THE FUCTIONS OF THE ORGANIZATION IN RELATION TO INTER-
NATIONAL ECONOMIC AND SOCIAL CO-OPERATION, AND UNDER

WHOSE AUTHORITY ECOSOC FUNCTIONS.

6. IN RESPECT OF THE PLO, THE GENERAL ASSEMBLY HAS IN ITS
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RESOLUTION 3237(XXIX) PROVIDED THAT THAT ENTITY SHOULD ENJOY
OBSERVER STATUS IN VARIOUS ORGANS AND CONFERENCES OF THE UNITED
NATIONS. ECOSOC HAS GRANTED SUCH STATUS OT THE PLO UNDER RULE
73 OF ITS RULES OF PROCEDURE, AND ECWA HAS GRANTED THE PLO PERMANENT
OBSERVER STATUS BY RESOLUTION 12(II). IF THE COUNCIL WERE, ON
ITS OWN AUTHORITY, TO GRANT FULL MEMBERSHIP TO THE PLO IN ECWA,
IT MIGHT BE CONSIDERED AS GOING BEYOND THE LETTER
AND POSSIBLY THE SPIRIT OF THE RESOLUTION OF THE ASSEMBLY, WHICH
IS THE ORGAN PREEMINENTLY QUALIFIED TO MAKE POLITICAL DECISIONS IN
THE ORGANIZATION (SEE, E.G., G.A. RESOLUTION 396(V)).

7. HOWEVER, ECOSOC HAS IN THE PAST CREATED THE CATEGORY OF
ASSOCIATE MEMBERS IN RESPECT OF THREE OF THE REGIONAL COMMISSIONS
(ECA, ECLA, ESCAP) IN ORDER TO PROVIDE FOR THE PARTICIPATION OF NON-
SELF-GOVERNING TERRITORIES (AND IN ECA, ALSO OF THE ADMINISTERING
AUTHORITIES THEREOF), EVIDENTLY CONSIDERING THAT, NOT BEING STATES,
THEY LACKED THE CAPACITY TO BECOME FULL MEMBERS OF THESE COMMISSIONS;
SUCH A CATEGORY, WHICH HAS NOT YET BEEN, BUT COULD ALSO BE
CREATED FOR ECWA, WOULD SEEM MORE APPROPRIATE FOR AN ENTITY SUCH
AS THE PLO. IN ADDITION, IT MIGHT BE NOTED THAT THE COUNCIL HAS,
IN RESPECT OF EACH REGIONAL COMMISSION, ALSO PROVIDED THAT VARIOUS
STATES AND OTHER ENTITIES (E.G., THE FORMER FREE TERRITORY OF
TRIESTE, IN RESPECT OF ECE) NOT MEMBERS OF A COMMISSION,
MIGHT ENJOY A "CONSULTATIVE CAPACITY" THEREIN.

8. CONSEQUENTLY, OUR SPECIFIC RESPONSES TO THE THREE QUERIES IN
PARAGRAPH 1 OF MR. VAN HOEK'S MEMORANDUM ARE AS FOLLOWS:

(I) AS THE COMPOSITION OF EACH OF THE FIVE EXISTING REGIONAL
COMMISSIONS IS FORMULATED UNIQUELY, A CHANGE IN THE
COMPOSITION OF ONE COMMISSION WOULD NOT DIRECTLY AFFECT
OR IMPLY A CHANGE IN THE COMPOSITION OF THE OTHERS --
EXCEPT AS THE ESTABLISHMENT OR THE DISREGARD OF CERTAIN
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PRINCIPLES IN RESPECT OF ONE COMMISSION MIGHT BE CON-
SIDERED AS PRECEDENTS RELEVANT TO THE OTHERS (SEE SUB-
PARAGRAPH (III) BELOW).

(II) IN VIEW OF THE SILENCE OF THE CHARTER ON THE SUBJECT OF
THE COMPOSITION OF REGIONAL COMMISSIONS, NO DECISION OF

EITHER THE GENERAL ASSEMBLY OR ECOSOC ON THIS SUBJECT WOULD IMPLY A CHANGE IN THAT INSTRUMENT, THOUGH THE CREATION OF A MIXED-TYPE (I.E., BOTH STATES AND OTHER ENTITIES) FULL MEMBERSHIP IN A REGIONAL COMMISSION WOULD CONSTITUTE AN IMPORTANT CHANGE IN THE CONSTITUTIONAL PRACTICE OF THE PAST THIRTY YEARS.

(III) ALTHOUGH, AS INDICATED IN SUB-PARAGRAPH (II) ABOVE, NO AMENDMENT OF THE CHARTER WOULD BE REQUIRED TO CHANGE THE NATURE OF THE COMPOSITION OF REGIONAL COMMISSIONS, THE CREATION OF A MIXED FULL MEMBERSHIP IN ONE OF THEM WOULD BE A PRECEDENT RELEVANT TO BOTH THE OTHER SUCH COMMISSIONS AND TO OTHER INTERGOVERNMENTAL ORGANS AT PRESENT CONSISTING SOLELY OF THE REPRESENTATIVES OF STATES.

9. SUMMING UP, THERE IS NO LEGAL IMPEDIMENT OF ECOSOC GRANTING MEMBERSHIP TO THE PLO IN ECWA. HOWEVER, FOR THE ABOVE- STATED REASONS, IT WOULD APPEAR MORE CONSISTENT WITH CONSTITUTIONAL PRACTICE FOR ECOSOC TO CREATE A SPECIAL CATEGORY OF MEMBERSHIP IN ECWA TO ACCOMMODATE THE PLO.

IIM MEMBERSHIP OF EGYPT

10 ON 28 APRIL 1977 ECWA ADOPTED RESOLUTION 37(IV) ON THE APPLICATION BY THE ARAB REPUBLIC OF EGYPT FOR MEMBERSHIP ON THE ECONOMIC COMMISSION FOR WESTERN ASIA", IN WHICH IT RECOMMENDED THAT ECOSOC APPROVE THE ADMISSION OF EGYPT AS A MEMBER OF ECWA. ALTHOUGH THIS RECOMMENDATION WOULD APPEAR CONSISTENT WITH THE EXISTING TEXT GOVERNING THE COMPOSITION OF ECWA (SEE PARAGRAPH 2 ABOVE), THERE ARE SEVERAL LEGAL QUESTIONS THAT REQUIRE COMMENT. CONFIDENTIAL

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1. UNLIKE THE ECA, ECLA AND ESCAP, BUT NOT ECE, ECWA'S GEOGRAPHICAL SCOPE IS NOT DEFINED EXPLICITLY IN ITS TERMS OF REFERENCE, THOUGH A CERTAIN RESTRICTION IS IMPLIED BY ITS NAME. THE QUESTION MIGHT THEREFORE BE RAISED WHETHER THE ADMISSION OF EGYPT WOULD:

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(A) EXPAND THE GEOGRAPHICAL SCOPE OF THE COMMISSION, CERTAINLY BEYOND ITS EXISTING SCOPE (THAT PREVIOUSLY SERVICED BY UNESOB) BY INCLUDING THE SINAI, AND POSSIBLY EVEN BEYOND THE SCOPE IMPLIED BY ITS NAME, IF THE PRINCIPAL PART OF THE COUNTRY'S TERRITORY (I.E., THAT IN AFRICA) IS ALSO CONSIDERED TO BE INCLUDED? EITHER EXPANSION MIGHT ALSO RAISE ONCE MORE THE ISSUE OF WHETHER ECOSOC WOULD NOT BE IMPROPERLY EXCLUDING A MEMBER OF THE ORGANIZATION THAT IS CLEARLY WITHIN THE REGION SERVICED BY THE COMMISSION, CERTAINLY AS THUS EXPANDED.

(B) MERELY BE THAT OF A NON-REGIONAL MEMBER (SUCH AS, E.G., THE UNITED KINGDOM AND THE UNITED STATES IN ESCAP AND CANADA AND THE UNITED STATES IN ECE)?

12. EGYPT IS ALREADY A MEMBER OF ECA, BEING EXPLICITLY MENTIONED AS SUCH IN THE LATTER'S TERMS OF REFERENCE (ECOSOC RESOLUTION 671 A(XXV), PARA. 5, AS AMENDED AND REPRODUCED IN E/CN.14/111/REV.5/CORR.1); ADMISSION TO ECWA WOULD THUS GIVE THAT COUNTRY DUAL MEMBERSHIP. WHILE THIS WOULD NOT BE UNPRECEDENTED (E.G., THE UNITED STATES IS A MEMBER OF ECE, ECLA AND ESCAP; CANADA IS A MEMBER OF ECE AND ECLA; THE UNITED KINGDOM IS A MEMBER OF ECE AND OF ESCAP, AND ORIGINALLY WAS ALSO OF ECA), IT SHOULD BE NOTED THAT

THIS WOULD BE THE FIRST INSTANCE IN WHICH A POTENTIAL RECIPIENT OF ASSISTANCE FROM REGIONAL COMMISSIONS WOULD BE CONFIDENTIAL

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ENABLED TO RECEIVE ASSISTANCE FROM MORE THAN ONE. IF IT WISHES TO GRANT EGYPT MEMBERSHIP IN ECWA AS A REGIONAL MEMBER (SEE PARAGRAPH 11 ABOVE), ECOSOC MIGHT AT THE SAME TIME SPECIFY EITHER THAT IT IS TO BE ELIGIBLE TO RECEIVE ASSISTANCE FROM ONLY ECA OR ECWA, OR THAT ASSISTANCE IN RESPECT OF THE PRINCIPAL TERRITORY WOULD HAVE TO COME FROM ECA AND IN RESPECT OF THE SINAI FROM ECWA.

13. THERE WOULD THUS SEEM TO BE NO LEGAL OBSTACLE TO THE ADMISSION OF EGYPT AS A FULL MEMBER OF ECWA, IN PARTICULAR IF IT IS UNDERSTOOD THAT SUCH ADMISSION IS IN THE CAPACITY OF A NON-REGIONAL MEMBER NOT ENTITLED TO ASSISTANCE FROM THE COMMISSION (EXCEPT,

PERHAPS, IN RESPECT OF THE SINAI), OR ALTERNATIVELY IF THE EXTENT
OF THE EXTENSION OF THE GEOGRAPHICAL SCOPE OF THE COMMISSION IS
ADEQUATELY DEFINED AND APPROPRIATE PROVISIONS ARE MADE TO
PREVENT THE POSSIBLE DUPLICATION OF ELIGIBILITY FOR ASSISTANCE.

END TEXT. VANDEN HEUVEL

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